

1986

# State of Utah v. Michelle Davis Pursifull : Reply Brief

Utah Court of Appeals

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BRIEF

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DOCKET NO. 860259-CA

IN THE UTAH COURT OF APPEALS

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THE STATE OF UTAH, :  
Plaintiff-Respondent, : Case No. 860259-CA  
-v- : Category No. 2  
MICHELLE DAVIS PURSIFULL, :  
Defendant-Appellant. :

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REPLY BRIEF OF APPELLANT

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Appeal from the Judgment of the  
Third Judicial District Court in and for  
Salt Lake County, State of Utah,  
the Honorable Judith M. Billings, presiding.

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IN THE UTAH COURT OF APPEALS

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## SUMMARY OF THE ARGUMENT OF THE CASE

The relevant undisputed facts for review were stipulated to at the pretrial and trial motions to suppress the evidence and were corroborated at the trial by the testimony of the officers themselves. Therefore, there is no need nor useful purpose to cite the record in support of those facts. And those facts alone are sufficient to hold that the searches and seizures in this case were unreasonable. The other facts referred to in the respondent's brief as not being cited in the record may be ignored as surplusage.

The labeled security checks for other victims or suspects inside the residence beyond the front porch and front door were pretextual and did not fall within any exigent circumstances exception to the search warrant requirement, because they were conducted beyond the immediate scene of the shooting which occurred outside the residence from the front porch to where the victim was standing in the front doorway.

The later searches and seizures with a search warrant were also pretextual, poisoned by the initial warrantless searches and seizures, and not conducted according to proper procedure.

Therefore, both searches and seizures, with or without a search warrant were unreasonable, causing the evidence to be suppressed.

## ARGUMENT OF THE CASE

### POINT I

CITATIONS TO THE RECORD ARE NOT  
NECESSARY WITHIN THE STATEMENT OF  
THE RELEVANT FACTS FOR REVIEW  
WITHIN APPELLANT'S BRIEF UNLESS  
FACTS STATED ARE DISPUTED.

The statement of facts in respondent's brief does not contain all the facts stipulated to at the pretrial motion to suppress. At that hearing defense counsel suggested stipulated facts to avoid the necessity of witnesses.

Judge Billings then stated, "All right. Do you want to recite them in your version?"

In answer to that question, the prosecutor stated his version of the facts. (ln. 17, R. 213-ln. 11, R. 216):

Mr. Ybarra: Your Honor, if it please the court I believe I am prepared to recite what those facts are.

Your Honor, at approximately 7:34 on the 14th day of April, 1986, the police received a notification of a shooting at a location here in Salt Lake City. There were three police officers of the sheriff's department, Kirk Jensen, Scott Bell and-- Kirk Jensen, Craig Carroll and Kent Davis who arrived approximately simultaneously a few minutes after the call-in.

Judge Billings: There was Mr. Jensen, Davis, and who was the third?

Mr. Ybarra: Carroll, C-A-R-R-O-L-L.

Judge Billings: Ok.

Mr. Ybarra: Upon arriving at the scene they noted that there were approximately ten emergency medical technicians that were working on a victim lying in the driveway. They were notified by emergency medical technicians the body had been moved a few feet from where it was found

in the driveway beside a van or a truck.

Kirk Jensen, Deputy Kirk Jensen, found an unexpended cartridge next to where the body was lying. He took initial control of the scene asking Deputy Craig Carroll to take the defendant, who's present at the scene, into the house to find out what her story was, what was going on, what had happened.

He discovered from her that that morning that her boyfriend with whom she was living with her child, in the house in question, had received a knock at the door. The boyfriend had responded to the knock, there was heard a thud. The boyfriend left the apartment, chased after an assailant who had shot him in the chest, returned to the apartment, and loudly and insistently cried out he had been shot and asked for an ambulance to be called.

The defendant, Michelle Pursifull, at that time took a few minutes, called the ambulance and went outside where her boyfriend had gone out, out of the duplex and had fallen down to the pavement of the driveway.

Shortly thereafter the E.M.T.'s arrived, the three sheriff's officers arrived and shortly thereafter other members of the Salt Lake City Police Department arrived. Those names are unknown. And there are several other sheriff's officers and homicide (sic) detectives who arrived. Among them are Deputy Bell, a Deputy Thompson, a Deputy Judd, a Lieutenant Forbes, who took charge of areas, various portions of the crime scene.

Lieutenant Forbes was in charge and assigned out several of the deputies to perform certain tasks, among them being the diagram of the exterior and the interior of the premises and of making an oral description on a tape recorder of the crime scene.



Now, one of the uniformed police officers and sheriff deputies that arrived was a Deputy Lynn Wardle. Now, he arrived before the homicide (sic) investigators did. And as part of securing the scene that was begun by Deputy Jensen, Deputy Carroll, Deputy Bell, he assisted in securing the scene by entering the premises to determine whether or not there were any persons present and whether there was any persons injured or if there were any other exigent circumstances that needed to be taken care of before the homicide (sic) detectives arrived.

When the homicide (sic) detectives arrived Deputy Wardle pointed out to Detective Thompson that in a linen closet next to the master bedroom he had discovered what appeared to be three bales of marijuana. They were not seized at that time.

Based upon that information the narcotics division were called in. Based upon this information they obtained a search warrant and went back, searched the premises, seized the bales of marijuana as well as numerous other drugs and drug paraphernalia. And it's my understanding the drugs, the bales of marijuana, and the drug paraphernalia, is the basis of the motion to suppress at this time.

In answer to the very same question, and immediately following the prosecutor's version of the stipulated facts, the defense counsel stated his version of the stipulated facts. (ln. 12, R. 216-ln. 10, R. 217):

Mr. Hansen: Our contention is, Your Honor, that we go along with their version of the facts, so I don't think it would be necessary to call any witnesses. But our contention is in supplementary to his facts that as the knock on the door caused the deceased to go out to answer it, there was this crash, and he was shot by someone standing on the porch

in the doorway. And then Mrs. Pursifull, who was living with the victim at the time in the premises, though not married, ran out to see. She got up on the bed, looked out the window and saw somebody running down the street. She goes into the front room and sees her boyfriend and he says "I've been shot, Babe," and he points down to his chest and he falls into a rocking chair and sends her to get some help.

She went back in the bedroom, called 911 and came back out. He wasn't anywheres near the front door or the rocking chair. She went outside looking for him and he is underneath a truck outside. She took him from underneath the truck, laid him in her arms, the police came, and then she put the head down on the ground, waived the police where she was. They came and took her inside. They didn't ask for consent. They didn't have a warrant. And they did not make an arrest so it was not a search incidental to a lawful arrest. The only point is that the state contends that there was (sic) exigent circumstances.

There was no objection to the stipulated facts so far as the prosecutor stated his version. Nor was there any objection to the supplementary facts as stated in the defense counsel's version of the stipulated facts.

Consequently, the stipulated facts were undisputed and required no citations to the record.

## POINT II

THE SEARCH WITHOUT WARRANT CONDUCTED IN THIS CASE DOES NOT FALL WITHIN THE EXIGENT CIRCUMSTANCES EXCEPTION TO THE SEARCH WARRANT REQUIREMENT.

Perhaps we should resort to fundamental definitions of the word "exigent" for us to better understand what is meant by

the phrase "exigent circumstances."

Webster's Ninth New Collegiate Dictionary (1985) defines the word "exigent" (1): requiring immediate aid or action (2): requiring or calling for much: Demanding....

Webster's New World Dictionary (1984) defines the word "exigent": (1): calling for immediate action or attention; urgent; critical (2): requiring more than reasonable; demanding; exacting.

Webster's New World Thesaurus (1971) defines the word "exigent": (1): [Urgent] - Syn. pressing, critical, imperative; see urgent 1. wherein many synonyms are given, e.g. indispensable, demanded, essential, paramount, vital, crucial, instant, overruling, foremost, not to be delayed. Ant., untimely.

In the case of State v. Hygh, 711 P.2d 264 (Utah 1985), the Utah Supreme Court held at 267:

[1] Article I, Section 14 of the Utah State Constitution, and the fourth amendment to the United States Constitution prohibit unreasonable searches and seizures. In order for a search to be constitutionally permissible, a search warrant issued by a neutral magistrate and based upon probable cause is required. There are, however, several exceptions to the warrant requirement. These include a limited search incident to a lawful arrest;<sup>(5)</sup> search of an automobile based on probable cause that it contains contraband;<sup>(6)</sup> and seizure of evidence in plain view by one with a lawful right to be in a position to so observe it.<sup>(7)</sup> (Citations omitted.)

The above exigent circumstances exceptions do not include a warrantless search of the inside of a residence when the

shooting of the victim occurred from outside of the residence from the front porch to the front doorway where the victim was standing at the time he was shot and went outside, leaving a trail of blood from the front doorway, on the front porch, and on the outside driveway where he died after the suspect left the scene by running down the street.

It is believed that there are no Utah cases which include the circumstances of this case within the exigent exceptions to the search warrant requirement, even if the officers were acting in good faith with the purpose being to look for other victims or suspects within the residence.

§78-16-1, Utah Code Annotated 1953, as amended 1982, provides:

In establishing the provisions of this chapter it is the intent of the legislature to create an effective statutory remedy and deterrent for violation by peace officers and other governmental employees of the civil rights of the citizens of this state guaranteed by the Fourth and Fifteenth Amendments to the United States Constitution and Article I, Section 14 of the Constitution of Utah. This remedy shall stand in lieu of the exclusion of evidence in criminal cases for violation of the constitutionally protected rights except where those violations are substantial and peace officers were not acting in good faith.

Nevertheless, the Utah Supreme Court very, very recently (State v. Mendieta and Mendoza, Sup. Ct. Case No. 20922, decided December 1, 1987) held this statute to be unconstitutional under

the United States Constitution by its allowing a court to accept possibly tainted evidence if the evidence was obtained by peace officers in good faith.

### POINT III

THE SEARCHES AND SEIZURES, WITH OR WITHOUT A SEARCH WARRANT, CONDUCTED IN THIS CASE WERE PRETEXTUAL AND NOT CONDUCTED ACCORDING TO PROPER PROCEDURES.

Again, perhaps we should resort to fundamental definitions, this time for us to better understand what is meant by the word "pretext."

Webster's Ninth Collegiate Dictionary (1985) defines the word "pretext": to weave in front: a purpose or motive alleged or an appearance assumed in order to cloak the real intention or state of affairs.

Webster's New World Dictionary (1984) defines the word "pretext": 1. a false reason or motive put forth to hide the real one; excuse 2. a cover-up; front.

Webster's New World Thesaurus (1971) gives as synonyms: appearance, guise; see pretense 1. Examples of synonyms for the word "pretense" include insincerity, smoke screen, excuse.

Officer Wardle responded to the 7:34 call to supervise securing the scene (R.251). He was asked on cross examination:

... you weren't very sincere about security reasons in searching without a search warrant, were you?  
(Emphasis added.)

He answered:

No, sir. (R. 251).

Officer Wardle testified that he went inside the residence for the purposes of security reasons (R. 251), to determine whether or not other people were in there as possible victims or possible suspects. (R. 251). He searched the front room, the upstairs, kitchen, bedrooms, and bathroom area. (R. 248). He opened a closet door directly in front of a bedroom door (R. 248) which appeared to be a linen closet (R. 249) and found what appeared to be three large bundles of marijuana. (R. 250). He then went outside and informed Detective Forbes, who is over homicide, what he had found and contacted the narcotics division. He remained at the scene but did not participate in the subsequent search. (R. 250). He did not search the basement. Other officers were in the basement at the same time he was searching upstairs (R. 252), before the search warrant. (R. 251).

The officers arrived shortly after 7:30. (R. 247). The search warrant was executed at about 10:25. (R. 263).

Marijuana was also found in the hallway in the basement. (R. 369). And marijuana and drugs were strewn throughout the house. (R. 282, 293).

The other officers who were downstairs were still in the residence when Officer Wardle went outside. (R. 252). There is no evidence that they left the residence before the yellow ribbon, which was wrapped around the house to secure the area,

had been taken down around 3:00. (R. 263). In other words, there is no evidence that the officers in the basement did not remain within the residence for approximately three hours between the time of their entry until the search warrant was executed, and for approximately another four and one-half hours from the time the search warrant was executed until they left the area around 3:00.

Surely, it would not seem reasonable that it required three hours for a warrantless search of the inside of the residence to search for possible other victims or possible suspects, when it took four and one-half hours to search the inside of the residence for drugs. This is especially significant because Ms. Pursifull had told Officer Judd the suspect had run down the street and had never been inside the house. (R. 504).

If the officers were in fact in fear of the safety of the public, Ms. Pursifull, and themselves, why would they take her inside the residence shortly after they arrived so that she could calm down and tell them what had happened about the shooting?

Shortly after the other officers had taken Ms. Pursifull inside the residence, Officer Judd took her downtown to the Hall of Justice to further interrogate her about the shooting. (R. 374)

Almost all of the interrogation at the Hall of Justice was about drugs. Officer Judd told her that he had received many calls from the officers at her residence and that it was a dope dealer's paradise, a dope dealer's den. (R. 377).

The burden of proof is on the officers to establish any exigent circumstances exception to the requirement of a search warrant.

In the Hygh case, supra, the Utah Supreme Court held at 268 that fundamental constitutional guarantees against unreasonable searches cannot be evaded by labeling them what they are not.

#### CONCLUSION

The searches and seizures, with or without a search warrant, within the facts of this case were mislabeled. They were not exigent circumstances exceptions to the requirement of a search warrant. There was no true security search for other victims or suspects. Both the before and after warrant searches were pretextual. There was no probable cause for the search warrant. The officers had already searched the residence. They awaited the search warrant to make the seizures seem lawful, when in fact they were not.

An example of this contention is the fact that the three large bundles of marijuana were removed by someone from the closet to the living room in between the time Officer Wardle shut the door and Officers Sharp and Anderson executed the warrant. (R. 266, R. 343).

Another example of this contention is the fact that the other officers brought the evidence from the basement to the living room upstairs where Officer Sharp was executing the search

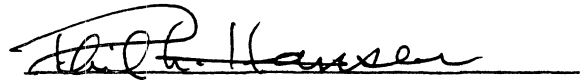


warrant. (R. 293).

Proper procedure was followed by not citing the record when stipulated facts were not disputed by either party.

The evidence seized should have been suppressed and the case dismissed.

RESPECTFULLY SUBMITTED this 7<sup>th</sup> day of December, 1987.



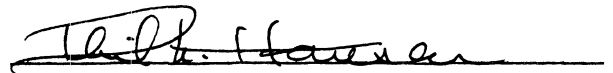
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CERTIFICATE OF SERVICE

I hereby certify that on the 7<sup>th</sup> day of December, 1987, four (4) copies of the foregoing Reply Brief of Appellant were served on the following:

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## ADDENDUM

# CONSTITUTION OF THE UNITED STATES

## AMENDMENT 4

**[Unreasonable searches and seizures.]**

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized

## AMENDMENT 14

**Section 1. [Citizenship - Due process of law - Equal protection.]**

**Section 2. [Representatives - Power to reduce appointment.]**

**Section 3. [Disqualification to hold office.]**

**Section 4. [Public debt not to be questioned. Debts of the Confederacy and claims not to be paid.]**

**Section 5. [Power to enforce amendment.]**

**Section 1. [Citizenship - Due process of law - Equal protection.]**

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of laws

## CONSTITUTION OF UTAH

### ARTICLE I. DECLARATION OF RIGHTS

#### Section 14. [Unreasonable searches forbidden - Issuance of warrant.]

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause supported by oath or affirmation, particularly describing the place to be searched, and the person or thing to be seized.

1896

## UTAH STATUTES

§78-16-1, U.C.A. 1953 (amend. 1982):

**78-16-1. Legislative intent - Remedy in lieu of exclusion of evidence in criminal cases.**

In establishing the provisions of this chapter it is the intent of the legislature to create an effective statutory remedy and deterrent for violation by peace officers and other governmental employees of the civil rights of the citizens of this state guaranteed by the Fourth and Fourteenth Amendments to the United States Constitution and Article I, Section 14 of the Constitution of Utah. This remedy shall stand in lieu of the exclusion of evidence in criminal cases for violation of the constitutionally protected rights except where those violations are substantial and peace officers were not acting in good faith. 1982